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No. _____

In The

Supreme Court of the United States

CHRISTY McKEE, and
PINTER ENTERPRISES, INC., d/b/a Club Juana,

Petitioners,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Fifth District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Florida appellate court's decision upholding Casselberry's Public Nudity Ordinance stand even though the trial court found that the ordinance was not supported by evidence of adverse secondary effects under *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002)?

Stated differently, is the *Alameda Books*' standard satisfied simply with a recitation by a trial judge (after a six-day trial) that Casselberry's Public Nudity Ordinance is constitutional because other local municipalities banned nudity?

2. Can the bathing suit requirement Casselberry imposed upon exotic dancers at Club Juana stand under the fourth prong of *United States v. O'Brien*, 391 U.S. 367 (1968), in light of *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 2016 (2004)?

PARTIES TO THE PROCEEDING

The parties listed in the caption are the only parties to the proceeding, specifically City of Casselberry, Florida and Christy McKee and Pinter Enterprises, Inc., d/b/a Club Juana.

CORPORATE DISCLOSURE

Pinter Enterprises, Inc.
Michael Pinter, Jr.
6150 South U.S. Highway 17-92
Casselberry, Florida 32730

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request this Court to issue a writ of certiorari to review the decision of the Florida Fifth District Court of Appeal entered in this case.

OPINIONS BELOW

The per curium decision of the Florida Fifth District Court of Appeal is reported as *McKee v. Casselberry,* 873 So.2d 373 (Fla. 5th DCA 2004), **App. A.** The trial court's order is reported as *McKee v. Casselberry*, 10 Fla.L.Weekly Supp. 408a (Fla. 18th Jud. Cir. 2003), **App. B.** The appellate court denied rehearing on May 5, 2004, **App. C.**

STATEMENT OF JURISDICTION

The decision of the Court of Appeal was entered on March 30, 2004, with rehearing denied on May 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case addresses the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. FACTS AND PROCEDURE

1. "Graceful and Slim, and Girls Who Peddle Fruit"

This case was tried under the procedure outlined in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). After a six-day trial, the trial judge, O.H. Eaton, Jr., entered judgment in favor of Casselberry and Seminole County.[1] This case garnered a great deal of media attention and there is an element of wry humor in Judge Eaton's orders. Much of the "ta do" focused upon the play "Les Femmes Fatale" commissioned by Club Juana. This play involved several scenes of nudity, including the "witches scene" from *Macbeth*. Media outlets as diverse as Home Box Office, the British Broadcasting Company and Public Broadcasting Service covered same.

After hiring playwright Morris Sullivan to author the script, notice was sent to local law enforcement agencies informing them that the play would be performed in the city limits. This was of special concern to the authorities because nudity had been banned by Casselberry and Seminole County, **App. F**. To insure that there was no dispute as to the nature of the performance, local officials were invited to videotape it. At least two videotapes of the performances (as well as the script, play bill, etc.) were moved into evidence.

Ultimately, all three actors, including Christy McKee, as well as Michael Pinter, Jr., the owner of Club Juana,

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[1] A petition is also being filed in the Seminole County case.

were arrested under Casselberry's ordinance.[2] In light of same, a challenge was brought against the ordinance. The matter was (initially) addressed by the trial court on the plaintiffs' motion for temporary injunction. See **App. D**.

> Double, double, toil and trouble;
> Fire burn and cauldron bubble;
>
> On the night of the performance of *Les Femmes Fatale*, law enforcement agents were present and filmed the production. The film is in evidence and the court has viewed it. Broadway quality it is not, but the performance is not "adult entertainment" (nude dancing) as much as it is "entertainment for adults." While reasonable persons may disagree with the quality of the performance, it contains the elements Mr. Sullivan testified it contained – political parody and satire – elements which are in the best of American traditions. Americans have been free to jab and poke fun at their government ever since King George was ousted from our shores and they must continue to be free to do so, even at the Club Juana. The performance falls within the exemption contained in the county ordinance because "it constitutes a part of a bonafide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or

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[2] Club Juana contends, among other things, that Casselberry's ordinance is also overbroad because it does not contain an exemption for theatrical performances involving nudity. See generally, *Triplett Grille, Inc. v. Akron*, 40 F.3d 129 (6th Cir. 1994).

> pretense utilized to exploit the conduct of being nude for profit or commercial gain."

McKee v. City of Casselberry, 7 Fla.L.Weekly Supp. 208a (Fla. 18th Jud. Cir. 1999), **App. D**, [temporary injunction order].

After the court denied the parties' respective motions for summary judgment, the case proceeded to trial. *McKee v. Casselberry*, 9 Fla.L.Weekly Supp. 317b (Fla. 18th Jud. Cir. 2002). After a six-day trial the court upheld both public nudity ordinances (county and city) finding that even though the city failed to present credible evidence supporting its ordinance, Casselberry's law could stand because other cities in the central Florida community banned nudity. This is obviously completely contrary to *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) [discussion of the four part *O'Brien* test].

> **Conforming** the city of Casselberry's ordinance regulating nudity to the other surrounding cities is a valid exercise of the city's police power and no further inquiry into the city's motivation need be made.

App. A.[3]

In making this ruling, the trial judge destroyed the fabric of *Alameda Books* by failing to recognize that a political justification for passing an ordinance (making Casselberry more like other cities which ban nudity) is constitutionally impermissible. This point is heightened

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[3] All emphasis in this petition has been added unless otherwise noted.

based upon the court's findings discounting the city's (secondary effects) evidence and its acceptance of the evidence presented by Club Juana.

For instance, evidence was presented that a "decoy prostitute"[4] was positioned on the highway near Club Juana to determine how many times she would be propositioned. Later, for comparison purposes, she was relocated to the entrance of a residential neighborhood. The following is the court's assessment of this evidence.

> Some of the testimony revealed anecdotal, rather than scientific studies. A lieutenant from the Seminole County Sheriff's Department testified that he was in charge of an exercise in which a female deputy posed as a prostitute and stood near the intersection of highway 17-92 and highway 436 in the city. The intersection of those two highways is one of the busiest in the state of Florida and is near the location of the Club Juana. Not surprisingly, the female deputy was attracting more than passing attention from some of the motorists driving by. Then she moved some distance down highway 17-92 to the entrance of a residential subdivision and, after an hour, she only attracted the city police, who received a complaint from one of the neighborhood residents about her presence.
>
> It was admitted this exercise was not scientific and the court gives no credibility to it for proof that the Club Juana or any other adult club in the area produces adverse secondary effects.

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[4] This was not a law enforcement exercise. There was no intention of arresting anyone.

> Prostitution, after all, has been around for thousands of years and is not caused by adult clubs any more than it is caused by hotels or Internet websites.

App. B.

The city also called a professor from the University of Washington. The trial judge emphatically rejected his testimony.

> William Henry George, Ph.D., a clinical psychologist and associate professor as well as the director of ethnic studies in the United States and the principal investigator for research of alcohol's effects on sexual arousal at the university of Washington, testified as an expert on behalf of the city.
>
> * * *
>
> Boiled down to its basics, Dr. George's "scientific experiments" include the use of volunteer college students of both sexes who were invited to drink alcohol and view erotic material. Sometimes the material was more erotic than others. Sometimes the material was pornographic. While Dr. George did not explain the brand or brands of alcohol he used in the experiments to any great degree it is apparent that his student volunteers were satisfied because they drank a lot of it.

App. B.

* * *

> It is disappointing to realize that the federal government has wasted the tax payers' money on this **ridiculous research**. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian

> Anderson, check to see if his science is clothing or in his imagination.

App. B at n. 2.

In contrast, the plaintiffs presented the testimony of Dr. Terry Danner who outlined, among other things, that there was more crime at the local Wal-mart and the local high schools than at Club Juana. This testimony was accepted by the court.

> In order to discredit the defendants' evidence, the plaintiffs called Dr. Terry Danner as a witness. He is a criminologist who chairs the Department of Criminal Justice at Saint Leo University. He specializes in analyzing the effects crime causes on economic activity. He challenged the theory that nude striptease dancing causes adverse secondary effects whether alcohol is served or not. He opined that "place management" is a "powerful variable" that effects whether or not crime occurs at any given establishment. **His testimony casts more doubt** upon the findings contained in the city of Casselberry's ordinance and the information the city relied upon and suggests that proper management is the key to successful adult club operations.

App. B.

Ms. McKee and Club Juana also presented the testimony of an anthropologist, Dr. Judith Hanna to challenge Casselberry's requirement that exotic dancers wear bathing suits (as opposed to g-strings, etc.). This testimony was likewise accepted by the trial judge.

> The testimony of one final witness needs to be discussed. The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah [sic], as an expert

> in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it is supposed to be somewhat naughty and somewhat risque and you're supposed to see more flesh than you would see elsewhere." Transcript, Page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah noted that more clothing is required than is seen at swimming pools and on the beaches) **she testified that the nature of the striptease is destroyed. That testimony is accepted as true.**

App. B.

Obviously over the course of a six-day trial there was a great deal of testimony presented to the trial judge – which was extensively outlined in the briefs filed with the state appellate court. However, at this juncture, suffice it to say that the trial judge accepted the plaintiffs' witnesses and rejected the city's. That is abundantly clear by reading the court's order, **App. B.**

An additional point is worth noting. Initially, Casselberry relied upon evidence (in passing its ordinance) that adult nightclubs cause a decrease in property values. As part of its preparation, Club Juana hired two experts, Dr. Randy Fisher and Richard Schauseil, who authored a number of studies addressing both residential and commercial property values as well as commerce in the local community. These reports were multi-volume and relied upon public record documentation.

Faced with these dispositive reports, Casselberry capitulated and stipulated that its ordinance was **not** premised upon any claim of adverse secondary effects

based upon property values. The plaintiffs did not wish to accept this stipulation, but in light of the concession, the trial judge ruled that he need not hear (as a matter of relevance) from these additional experts.[5]

As alluded to above, the plaintiffs also presented the testimony of Dr. Danner from Saint Leo University. His testimony was extensive and overwhelming that the nightclubs in the area did not cause adverse secondary effects. For instance, Dr. Danner reviewed data from the Florida Department of Law Enforcement from 1971 to 1998 (prior to the ordinance) and found that the three cities in Seminole County (where Casselberry is located) with the highest rates of index crime had no adult entertainment. He also prepared a graph based upon a collection of police service call data which involved a comparison of adult nightclubs in Seminole County with non-adult entertainment venues. The local mall and the Wal-mart in Casselberry were at the top of the list with the most service calls. The local "Denny's" had more criminal activity than the adult nightclubs – even though Denny's is less than half the size of Club Juana and another Casselberry nightclub, Rachel's. Danner testified that the legislative record presented by Casselberry in support of its ordinance was flawed and could not reasonably support the city's hypothesis. Again, his testimony was accepted by the trial judge, ["casting more doubt . . . ," **App. B**]. Perhaps of greater significance, Dr. Danner[6] found that crime in Casselberry actually rose after the passage of Casselberry's Public Nudity Ordinance – contrary to the city's

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[5] However, the studies were made part of the record.

[6] Dr. Danner's testimony was voluminous addressing national studies, Florida studies, rape statistics, etc.

hypothesis. The thrust of this petition is that the trial judge diverged from the standards imposed by this Court in finding that a public nudity ordinance could be upheld based upon a political justification – specifically, conforming a local ordinance to the surrounding community, even though these communities have no adult venues and no challenges had been levied against their ordinances.

> But, assuming information relied upon by the city was insufficient to justify passing the ordinance, the inquiry does not end there. If the evidence does not support the rationale used by the city in passing the ordinance or the evidence admitted by the plaintiffs' disputes that rationale, the burden shifts back to the city to supplement the record with evidence renewing support for a theory that justifies its ordinance.

App. B.

After this statement, the court addressed the testimony of Casselberry's city manager who testified that the city passed its ordinance so that it would conform with other cities in the area. The court accepted Mr. Schluckebier's reasoning that conforming Casselberry's ordinance with other municipalities was a legitimate basis for upholding the ordinance.

> **Conforming**[7] the city of Casselberry's ordinance regulating nudity to the other surrounding cities is a valid exercise of the city's police power and no further inquiry into the city's motivation need

[7] The *Alameda Books* standard would be completely unnecessary if Los Angeles only need argue that because Sacramento banned "X," Los Angeles could follow suit. Certainly, this would be an easy way to eliminate adult entertainment once and for all.

be made. The testimony of Mr. Schluckebier is convincing and it is accepted.

App. B.

On appeal, the petitioners argued that the trial court's decision was contrary to *Alameda Books*, *Pap's* and *Peek-a-Boo*. The appellate court affirmed, citing *Café 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995). On rehearing, Ms. McKee pointed out that *Café 207* was nullified by *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003) and this court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). This Court has never upheld a bathing suit requirement. There has to be a limit on clothing requirements under *O'Brien*. See **App. F** for a specific description of Casselberry's clothing requirement.

REASONS FOR GRANTING THE WRIT

POINT ONE

The Florida appellate court erred in upholding Casselberry's Public Nudity Ordinance in light of the trial court's finding that the ordinance was not supported by evidence of adverse secondary effects as required by *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002).

Or, stated differently,

A simple recitation by the trial judge (after a six-day trial) that Casselberry's Public Nudity Ordinance is constitutional simply because other local municipalities banned nudity fails to satisfy the *Alameda Books'* standard.

At one time, local governments were permitted to place restrictions upon businesses which sold alcohol[8] and offered "striptease" under the rubric that the Twenty-First Amendment granted such power. As the theory went, the states had the power to regulate alcohol sales and with that power came the right to regulate the entertainment offered by these businesses. *California v. LaRue*, 409 U.S. 109 (1972). This changed in 1996 when this court issued *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996), disavowing the Twenty-First Amendment analysis under *LaRue*.

The Twenty-First Amendment could no longer trump the First Amendment. Because so-called erotic or nude

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[8] Casselberry's ordinance applies to businesses which sell alcohol.

dancing is protected by the First Amendment, any reliance upon a Twenty-First Amendment analysis to restrict the entertainment offered at Club Juana no longer holds water. See *Carandola v. Bason*, 303 F.3d 507, 513, n. 2 (4th Cir. 2002); *LSO v. Stroh*, 205 F.3d 1146, 1159-1160 (9th Cir. 2000); *J.L. Spoons, Inc. v. City of Brunswick*, 181 F.R.D. 354, 356-357 (N.D. OH 1998) [*LaRue* overruled to the extent that it relied upon Twenty-First Amendment to restrict First Amendment].

Nor can Casselberry condition a constitutional right upon the requirement that another right be relinquished. In other words, the right to offer nude dancing at Club Juana cannot be infringed simply because Club Juana has a license to sell liquor. *44 Liquormart, supra*, 517 U.S. at 513; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *G & V Lounge, Inc. v. Michigan Liquor Control Comm.*, 23 F.3d 1071, 1077 (6th Cir. 1994).

The focus here, **prong two of the *O'Brien*[9] test**, hinges upon whether Casselberry was able to prove that the adult nightclubs in Seminole County cause adverse secondary effects such as higher crime rates and lower property values.[10] The ordinance should have been stricken when Casselberry did not meet its burden. *Flannigan's v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), [ordinance invalidated where police department study called into question secondary effects premise]; *Krueger v. City of Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985) [ordinance

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[9] *United States v. O'Brien*, 391 U.S. 367 (1968) [substantial government interest].

[10] The government always has the burden when First Amendment freedoms are at issue. *United States v. Playboy Entertainment*, 529 U.S. 808, 816-817 (2000).

invalidated where evidence lacking to support assertion]; *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985) [no evidence other than statements in ordinance].

More recently, this Court explained that the government's evidence must be real and concrete in nature.

> **This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.** If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standards set forth in *Renton*. (Citation omitted). If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to support the record with evidence renewing support for a theory that justifies its ordinance.

City of Los Angeles v. Alameda Books, 535 U.S. 425, 438-439 (2002).[11] The city's evidence cannot be based upon speculation or conjecture. *Flannigan's*, 242 F.3d at 986. Not only must the purported harms associated with nude dancing be real and not conjectural, Casselberry's ordinance must alleviate the harms (allegedly) associated with nude dancing in a material way. *Carandola v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *J & B Entertainment, Inc. v. City*

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[11] The lower courts have been less than uniform in construing the *Alameda Books*' standard. Compare *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003) and *Encore Video v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003) with, for example, *Worldwide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004).

of Jackson, 152 F.3d 362, 371-373 (5th Cir. 1998); *Phillips v. Borough of Keyport*, 107 F.3d 164, 173-175 (3rd Cir. 1997) (en banc).

Here, the evidence Casselberry relied upon is scanty indeed. In fact, once the reader discounts the gratuitous statements made in the legislative record, Casselberry's pre-enactment "evidence" comes down to a handful of charts. Most of them are irrelevant. Three of them are simply a comparison between different cities' "nudity and zoning" regulations[12] and "alcohol and nudity" regulations. They are insignificant for purposes of determining adverse secondary effects. The city's fire-rescue response documents are likewise meaningless for purposes of adverse secondary effects. Further, as demonstrated by Dr. Danner, they are inherently unreliable. The same can be said for the two remaining charts (R9/1684-1685). Not only are the comparisons of businesses inherently flawed, the percentage of crime at the comparison businesses (e.g., Bennigan's) **were actually higher** than those of Club Juana and the other adult businesses. The city commission was given a document showing there were no prostitution or drug arrests at the adult businesses for the proceeding ten years, and that the "Denny's" had a higher percentage of reported suspicious persons, larceny charges, fights and accidents. When one considers that Denny's is half the size of Rachel's or Club Juana, these figures take on an even greater significance.

Rather than rehashing the evidence presented below, this case can be summed up by the fact that the trial court

[12] The political justification – conforming Casselberry to other municipalities.

rejected Casselberry's evidence. **Instead, the court upheld the ordinance on a misplaced legal theory – that Casselberry could prohibit nude dancing because other municipalities had ordinances prohibiting same.** This justification completely undermines and ignores *Alameda Books* and *Pap's*.

Because of this distortion, and because this case gives the Court a clear opportunity to highlight the import of the *Alameda Books*' standard (based upon a trial on the merits), this Court should accept review over this case.

POINT TWO

The bathing suit requirement Casselbery imposes upon exotic dancers at Club Juana cannot stand under the fourth prong of *United States v. O'Brien*, 391 U.S. 367 (1968), in light of *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003)

In order to pass muster, Casselberry's ordinance can only be upheld if it restricts the entertainment at Club Juana no greater than necessary to further the government's interest in curbing the alleged "secondary effects" associated with nude dancing. *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003). This analysis can be reviewed in the following way. First, did the city offer evidence (much less credible evidence) that showed that requiring a dancer to wear a bathing suit will decrease crime and are the clothing requirements tailored so that they are no greater than necessary to further this interest? Second, and of equal importance, do the clothing

requirements attenuate or destroy the nature of adult dancing?

Justice O'Connor summed it quite well when she stated:

> It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be **no greater than necessary to further the city's interests.**

City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000).

More recently, this Court readdressed this requirement in *City of Los Angeles v. Alameda Books*, 533 U.S. 425 (2002). Justice Kennedy's concurring opinion is controlling because his decision constitutes the narrowest holding under *Marks v. United States*, 430 U.S. 188 (1977).

> At the outset, we must identify the claim a city must make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, **while leaving the quantity and accessibility of speech substantially intact.** The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with Justice Souter. See post at 5. The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech.

* * *

> As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech.

Alameda Books at 449-450.

* * *

> **It is no trick to reduce secondary effects by reducing speech or its audience**; but a city may not attack secondary effects indirectly by attacking speech.

Id. at 450.

More recently, in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), the Eleventh Circuit all but invalidated Manatee County's ordinance which, like Seminole County and Casselberry's, requires dancers to wear bathing suits rather than performing nude or in G-strings.

> The question we face is whether the county's prohibition, which presumably impacts the expressive component of erotic dancing, is no greater than essential to further the county's interest in preventing secondary effects. In *Pap's A.M.*, the court determined that this issue required the balancing of competing interests, and it concluded that a pasties and G-string requirement survived intermediate scrutiny because it

> "leaves ample capacity to convey the dancers' erotic message."

Peek-A-Boo at 1273.

* * *

> Nevertheless, we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a "de minimis" effect on the expressive component of erotic dancing or "leaves ample capacity to convey the dancers' erotic message" *Id.* On the contrary, because erotic dancers in Manatee County are not "free to perform wearing pasties and G-strings," *Id.*, arguably, the county's prohibition could significantly impact that message.

Id. at 1274; *Lyndon v. Beyer*, 627 N.W. 2d 548, 2001 Wisc.Ct.App. Lexis 265 (Wisc.Ct.App. 2001).

Therefore, in terms of the record at issue, four points must be considered. First, the city offered no justification for choosing a bathing suit requirement rather than a G-string clothing requirement. Second, neither the city nor the county attempted, much less offered, any evidence that requiring a dancer to wear a bathing suit will reduce "adverse secondary effects" and that that requirement is the least restrictive means to achieve its goal. Third, Dr. Hanna's testimony was unchallenged and unrebutted – requiring a striptease dancer to wear a bathing suit destroys the nature of adult dancing at businesses like Club Juana. Fourth and finally, it cannot be emphasized enough that the trial judge accepted Dr. Hanna's testimony as true.

> The testimony of one final witness needs to be discussed. The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah, as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it is supposed to be somewhat naughty and somewhat risque and you're supposed to see more flesh than you would see elsewhere." Transcript, Page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah noted that more clothing is required than is seen at swimming pools and on the beaches) she testified that the nature of the striptease is destroyed. **That testimony is accepted as true**.

App. B.

The trial judge got the facts right but got the law wrong. For whatever reason he misunderstood the nature of the fourth prong of *O'Brien*.

This Court should accept this case for two principal reasons. The first is the conflict with *Pap's* and *Alameda Books*, and the second is because it gives the court an opportunity to address once and for all, that there is a limit to public nudity ordinances. Local governments cannot continually increase the clothing requirements, thus destroying these businesses and the entertainment known as "striptease." There must be limitations under the First Amendment – otherwise this court's edict that these businesses are protected by the First Amendment becomes a charade.

CONCLUSION

Based upon the foregoing, the Petitioners request that this Court grant their petition.

Respectfully submitted this 3rd day of August, 2004.

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APPENDIX A

CHRISTY MCKEE AND PINTER ENTERPRISES, INC., Appellant, v. CITY OF CASSELBERRY, FLORIDA, Appellee.

Case No. 5D03-1744

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

873 So. 2d 373; 2004 Fla. App. LEXIS 4683

March 30, 2004, Opinion Filed

NOTICE: DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Rehearing denied by *McKee v. City of Casselberry*, 2004 Fla. App. LEXIS 7799 (Fla. Dist. Ct. App. 5th Dist., May 5, 2004)

PRIOR HISTORY: Appeal from the Circuit Court for Seminole County, O.H. Eaton, Jr., Judge.

COUNSEL: Steven G. Mason of Steven G. Mason, P. A., Orlando, for Appellant.

Anthony A. Garganese and Erin J. O'Leary of Brown, Salzman, Weiss & Garganese, P.A., Orlando, for Appellee.

JUDGES: PLEUS, PALMER and ORFINGER, JJ., concur.

OPINION: PER CURIAM.

AFFIRMED. See *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995).

PLEUS, PALMER and ORFINGER, JJ., concur.

APPENDIX B

CHRISTY McKEE et al., Plaintiffs, v.
CITY OF CASSELBERRY, FLORIDA, Defendant.

Circuit Court, 18th Judicial Circuit Seminole County,

PAULINE KOZIARA et al., Plaintiffs, v.
SEMINOLE COUNTY, FLORIDA, etc., Defendant.

Case Nos. 99-CA-1430-16-E, 99-CA-511-16-E.

April 23, 2003.

O.H. Eaton, Jr., Judge.

Counsel: Steven G. Mason, Steven G. Mason, P.A., Orlando, for Plaintiffs.

Frederick J. Nelson, Orlando, for Defendant Seminole County.

Jeffery Weiss and Debra S. Babb, Orlando, for Defendant City of Casselberry.

1. *FINAL JUDGMENT*

Then entered dancing-girls of ill repute,
Graceful and slim, and girls who peddled fruit,
Harpers and bawds and women selling cake,
Who do their office for the Devil's sake,
To kindle and blow the fire of lechery,
Which is so closely joined with gluttony;
I call on holy writ, now, to witness
That lust is in all wine and drunkenness.
Geoffrey Chaucer
The Pardoner's Tale, 1380 A.D.

The plaintiffs in this action have asked for the court to rule upon the validity of the ordinances passed by Seminole County and the City of Casselberry commonly referred to during this litigation as the "anti nudity ordinances." For the reasons stated herein, the court has determined that the relief requested by the plaintiffs must be denied.

Historically, one of the plaintiffs, Club Juana, began operations in the City of Casselberry as an adult entertainment night club in the late 1960's. At that time, the City of Casselberry and Seminole County had little regulation of the adult entertainment industry. Prior to or subsequent to the opening of the Club Juana, all of the other municipalities in Seminole County passed prohibitory ordinances banning adult entertainment.

A proliferation of these clubs occurred in the environs of the City of Casselberry in the 1990's, possibly as a result of stricter regulation of such establishments in Orange County. By the time these ordinances were being considered there were between five and seven adult entertainment clubs in the City of Casselberry and close by in south Seminole County.

The testimony presented at trial provides insight for the motive for passing these ordinances. One, or even two or three, of these adult entertainment clubs in South Seminole County was tolerable to both the city and the county for many years but the tolerance level decreased as the number of clubs increased. And so, both the city and the county spent enormous amounts of time, energy and effort to pass ordinances that regulate the clubs to the point of discouraging their continued operation.

There are two problems with the approach taken by the city and the county in enacting these ordinances. First, the ordinances were passed *after* the proliferation of the adult clubs rather than *in anticipation* of their proliferation. Second, because the ordinances were not enacted earlier, it was not possible to "grandfather in" the few original establishments and maintain the status quo, thereby minimizing the impact the adult entertainment industry had on the area without disrupting those businesses that were already operating there.

Both the Seminole County ordinance and the City of Casselberry ordinance make legislative findings. The Seminole County ordinance relies upon the desires of the citizens of the County (apparently as a result of a referendum on the ordinance) as well as prior court decisions that approved similar ordinances elsewhere. The City of Casselberry ordinance also relies upon a referendum. And while it relies upon prior court decisions to some extent, the pleadings frame the issue of whether the city's reliance upon other information was reasonable in order to prove that nudity combined with alcohol produces adverse secondary effects. The court was of the opinion that mixed questions of law and fact were presented and declined to enter summary judgment for the defendants. As explained later, had the issue been "better put" the trial of this case may have been avoided.

The Seminole County Public Decency Ordinance is an anti nudity ordinance (with exemptions) and provides as follows:

> Section 5. Nudity, Sexual Conduct Prohibited.
>
> (a) No person shall knowingly, intentionally, or recklessly appear, or cause another person to

appear, nude, as defined in section 3(d), or expose to public view his or her genitals, vulva, penis, pubic area, or buttocks, or any simulation thereof;

(b) No person shall knowingly, intentionally, or recklessly expose, or cause a female person to expose her breasts or any simulation thereof to public view;

(c) No person or entity maintaining, owning or operating a public place shall encourage, allow or permit any person to appear nude or to expose to public view his or her genitals, pubic area, vulva, penis, anus or any portion of the buttocks or simulation thereof. This section shall be violated if any portion of the buttocks is visible from any vantage point.

* * * *

(f) Each female person may determine which 1/4 of her breast surface area (see definition of breast) contiguous to and containing the areola is to be covered;

* * * *

(h) It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in Section 3(d), in a public place or in any other place which is readily visible to the public; except as provided in Section 6. It shall also be unlawful for any person or entity maintaining, owning, or operating any public place to encourage, suffer or allow any person to appear nude in such public place, except as provided in Section 6.

Section 6. Exemptions. The prohibitions of Section 5 of this Ordinance shall not apply:

* * * *

> (b) when the conduct of being nude cannot legally be prohibited by this Ordinance because: (i) it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (citation omitted), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution.

The City of Casselberry Ordinance "is in addition to" the Seminole County ordinance. Also, it prohibits nudity in establishments that serve alcoholic beverages. It provides as follows:

* * * *

> Whereas, the City Commission of the City of Casselberry, Florida, hereby finds and declares that this Ordinance is in addition and supplemental to the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code and that this Ordinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code; and

> Whereas, the City Commission of the City of Casselberry hereby finds and declares that this Ordinance shall not be construed as opting the City of Casselberry out of the Seminole County Public Decency Ordinance * * * * .
>
> * * * *
>
> It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited.

Thus, since the Casselberry ordinance "is in addition and supplemental to the Seminole County Public Decency Ordinance" and the "[o]rdinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code," the two ordinances must be read together when applying them to the Plaintiffs in this case.

There has to be a starting point in determining the validity of these ordinances and as good a starting point as any is a principle of law. Like it or not, nude dancing is protected to some extent by the First Amendment of the United States Constitution. As the United States Supreme

Court stated in *City of Lake Erie v. Pap's A.M.*, 529 U. S. 277, 120 S. Ct. 1382, 146 L.Ed.2d 265 (2000):

> Being "in a state of nudity" is not an inherently expressive condition. As we explained in Barnes, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See Barnes v. Glen Theater, Inc., 501 U.S., at 565-566, 111 S.Ct. 2456 (plurality opinion); Schad v. Mount Ephraim, 452 U.S. 61, 66, 101 S.Ct.. 2176, 68 L.Ed.2d 671 (1981).

Therefore, courts are required to approach these cases with that outer limit in mind.

The governmental interest in combating adverse secondary effects is the justification for these types of ordinances. As stated above, the plaintiffs have attacked the justification by attacking the legislative findings. The attack extends to whether the legislative bodies reasonably relied upon information supplied to them in making the findings. The approach taken by the plaintiffs has met with some success in the past. For instance, it has been held that when a city enacts an ordinance that prohibits persons under the age of twenty-one from entering adult entertainment establishments, it must justify the restriction as being one that furthers government interests by combating adverse secondary effects. *Essence, Inc. v. City of Federal Heights*, 285 F.2d 1272 (10th Cir. 2002).

Interestingly, both Seminole County and the City of Casselberry could have simply relied upon prior studies from other cities or prior court opinions instead of going through the motions of holding referenda and making legislative findings based upon data collected by various

agencies and individuals. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). [Reliance upon an opinion of the Supreme Court of Washington in *Northern Cinema, Inc. v. Seattle*, 585 P.2d 1153 (Wash. 1978), was sufficient to justify enactment of adult entertainment ordinance.] The evidence is convincing that Seminole County mainly relied upon prior court decisions and the findings made in them in enacting its ordinance.

And while the Plaintiffs have attacked both ordinances, the focus has been on the City of Casselberry's ordinance with the lawyers for both defendants meticulously adopting the testimony of each other's witnesses. This focus has been of interest because Section 9 of the county's ordinance provides that the ordinance has "countywide effect in all areas of Seminole County, Florida, unless a City elects to opt out in accordance with the charter." In its ordinance, the City of Casselberry specifically declares that it is not opting out of the County ordinance. So, successfully attacking the city's ordinance will provide little relief for the plaintiffs unless the county's ordinance is also successfully attacked.

Several witnesses were produced who testified about the information available to the city that was relied upon in passing the ordinance. A review of some of the testimony is helpful to understand the issues and the positions of the parties, particularly the City of Casselberry.

Some of the testimony revealed anecdotal, rather than scientific, studies. A Lieutenant from the Seminole County Sheriff's Department testified that he was in charge of an exercise in which a female deputy posed as a prostitute and stood near the intersection of Highway 17-92 and Highway 436 in the city. The intersection of those two

highways is one of the busiest in the State of Florida and is near the location of the Club Juana. Not surprisingly, the female deputy attracted more than passing attention from some of the motorists driving by. Then she moved some distance down Highway 17-92 to the entrance of a residential subdivision and, after an hour, she only attracted the city police, who received a complaint from one of the neighborhood residents about her presence.

It was admitted this exercise was not scientific and the court gives no credibility to it for proof that the Club Juana or any other adult club in the area produces adverse secondary effects. Prostitution, after all, has been around for thousands of years and is not caused by adult clubs any more than it is caused by hotels or internet web sites.

Testimony was also presented that the disc jockey at the Club Juana was arrested for drug trafficking back in 1988 and the City-County Investigative Bureau made street level drug buys in adult clubs and hotels on other occasions. This testimony shows that drugs are readily available in South Seminole County but does not connect their availability to the Club Juana any more than it does to hotels, bars or other establishments not covered by the ordinances in question here, including shopping malls.

The city presented numerous documents as exhibits to prove adverse secondary effects occur as a result of serving nudity with alcohol. These documents include records of service calls made by the police to various locations, crime rate statistics and other information. Taken together, the testimony presented and the evidentiary exhibits submitted suggest, but do not prove, that adult clubs cause adverse secondary effects.

In order to discredit the defendant's evidence, the plaintiffs called Dr. Terry Danner as a witness. He is a criminologist who chairs the Department of Criminal Justice at St. Leo University. He specializes in analyzing the effects crime causes on economic activities. He challenged the theory that nude striptease dancing causes adverse secondary effects whether alcohol is served or not. He opined that "place management" is a "powerful variable" that affects whether or not crime occurs in any given establishment. His testimony casts more doubt upon the findings contained in the City of Casselberry's ordinance and the information the city relied upon and suggests that proper management is the key to successful adult club operations.

But, assuming information relied upon by the city was insufficient to justify passing the ordinance, the inquiry does not end there. If the evidence does not support the rationale used by the city in passing the ordinance, or if the evidence submitted by the plaintiffs disputes that rationale, the burden shifts back to the city to supplement the record with evidence renewing support for a theory that justifies its ordinance. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1778, 152 L.Ed 2d 670 (2002). In order to provide additional support to justify the ordinance, the city presented additional evidence.

William Henry George, Ph.D., a clinical psychologist and associate professor, as well as the Director of Ethnic Studies in the United States, and the Principal Investigator for Research on Alcohol's Effects on Sexual Arousal at the University of Washington, testified as an expert on behalf of the city.

Dr. George has conducted research experiments on alcohol and sexual behavior for over twenty years. He received a Federal grant from the National Institute of Health "to initiate experiments to study the effects of drinking on sexual arousal and sexual risk taking." The grant amounted to $1,800,000.00 over a five-year period. *Transcript*, P. 677. He has received at least 3 other Federal grants. *Transcript*, P. 700.

Boiled down to its basics, Dr. George's "scientific experiments" include the use of volunteer college students of both sexes who were invited to drink alcohol and view erotic material. Sometimes the material was more erotic than others. Sometimes the material was pornographic. While Dr. George did not explain the brand or brands of alcohol he used in the experiments to any great degree, it is apparent that his student volunteers were satisfied because they drank a lot of it. He came to the following findings and "scientific conclusions" as a result of his studies:

1. Finding – Students who were exposed to erotic material drank more than those who were not so exposed.

2. Finding – Students who anticipated that they would get more erotic material drank more than those who did not.

3. Finding – Exposure to erotic materials can make you drink more.

4. Finding – Men see a woman who is drinking as being more sexually available than a woman who is not drinking and, if she is nude, the woman is seen as being even more available.

5. A person who is drunk rather than merely intoxicated may do things he wouldn't ordinarily do, including committing crimes because one of the effects of alcohol taken to excess is to "disinhibit" the person.[1]

6. He could not speculate that in a "dancers versus patrons" situation his findings and conclusions would apply.

Dr. George appears to take himself seriously and honestly believes he has made scientific advancements in the field of human behavior.[2] The Federal Government could have saved a lot of money by referring Dr. George to the *Pardoner's Tale* by Geoffrey Chaucer. What did he and the taxpayers learn that Chaucer did not already know more than 600 years ago? Of course, Dr. George limited his research to the laboratory and not "in the field." One gets the distinct impression after observing the female plaintiffs in this case over a period of several days, that when they are *au naturel* and approach a customer who has been drinking for the purpose of earning money in exchange for dancing, they, and not the customer, are in complete control.

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[1] This finding does not take into account the fact that individuals who are past age 35, drunk or sober, are generally less likely to commit crimes than persons under 35. Barlow, *Introduction to Criminology*, Fifth Ed., p. 279.

[2] It is disappointing to realize that the Federal Government has wasted the taxpayer's money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

Testimony was presented through a number of witnesses that an extensive, and expensive, investigation of illegal activities was conducted at one of the South Seminole County clubs known as Rachael's. There is no question about the illegal activity, nor the extent of the investigation. More than forty hours of "undercover" V.H.S. tapes were introduced into evidence to document it. The owners of the establishment allowed illegal activities to occur and the engines of the criminal justice system went to work as a result. However, the evidence does not establish that nude dancing caused this criminal activity. The causation resulted from the management providing the place and opportunity for it to happen. Prostitution, drug offenses and related vice activities occur in places not covered by these ordinances with some regularity.

The city manager, Jack Schluckebier saved the day for Casselberry. He stated that the city decided to hold workshops when it received a fourth application for an adult establishment. He testified that "Casselberry is distinctive in that it allows performance establishments in commercial areas whereas other cities typically do not." *Transcript*, P. 192-93. He also testified as follows:

> So the city commission was just looking at their possibilities and trying to be advised as to what their chances were to improve regulating the adverse impacts that they were seeing all around them with all of these clubs opening and the concerns that were being expressed to the city's elected representatives by their constituents.

Transcript, P. 185.

> Q: Could you please describe that information that city staff provided to the commission?

A: The first two pages have to do with the staff and the delineation of sexually oriented business, adult entertainment establishment regulations that the county was doing. It was our opinion that the city should do a comparable ordinance but not precisely join with the county at that time.

* * * *

The third item was comparisons of municipalities in Seminole County as to their level of allowance for nudity in their codes, their level of allowance for alcohol mixed with nudity, and similar to that provision on both state law and other statutory basis for the city commission to give consideration to some restrictions on those topics.

Transcript, P. 199-205.

Q: Did the city staff prepare any kind of exhibits discussing a comparison of Casselberry's ordinance versus other cities and the county regarding what they do in their codes regarding adult entertainment?

A: Yes, ma'am. Attached to that communication were three charts. The first one is a comparison of adult entertainment zoning regulations. The second one, a comparison of the nudity regulations for cities in Seminole County and those surrounding Casselberry and Orange County, as well as Seminole County and Orange County. And the third, a comparison of alcohol and nudity regulations, and whether the alcohol and nudity are allowed together. They were trying to determine the community standards elsewhere as compared to Casselberry.

Transcript, P. 206.

> Q: Did the ordinance also set forth the comparison of the Casselberry code to codes of its neighbors?
>
> A: Yes, it did. That was something specifically that kept reoccurring for the commission was this fact that Casselberry was unique in having performance establishments, having so many in southeast Seminole, but not only in the city but adjacent. They wanted to know why when they employed the standard of their neighbors, they determined our standards were lower. And so, that was an issue that was a determined by the commission, that was an issue for them to address.

Transcript, P. 225.

Conforming the City of Casselberry's ordinance regulating nudity to the other surrounding cities is a valid exercise of the city's police power and no further inquiry into the city's motivation need be made. The testimony of Mr. Schluckebier is convincing and it is accepted.

Ordinances regulating nudity in establishments that serve alcohol have been approved by the courts time and time again. *Café 207, Inc. v. St. John's County*, 66 F.3d 272 (11th Cir. 1995); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003). The City of Casselberry's ordinance is no better and no worse than those that have met with prior approval. The ordinance is valid and enforceable.

The attack on Seminole County's ordinance also fails. The county reasonably relied upon prior court decisions and the findings contained in them in drafting the Seminole County Public Decency Ordinance.

The testimony of one final witness needs to be discussed. The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah, as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it is supposed to be somewhat naughty and somewhat risque and you're supposed to see more flesh that you would see elsewhere." *Transcript*, Page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah noted that more clothing is required than is seen at swimming pools and on the beaches) she testified that the nature of the striptease is destroyed. That testimony is accepted as true. Since the courts have approved these types of ordinances in the past, the only question remaining is what is left of the "outer ambit of first amendment protection" for nude dancing? Not much, apparently. At least there is still Shakespeare, Wagner, the Internet and nightly television.

IT IS ADJUDGED:

All relief requested by the Plaintiffs is denied and the defendants may go hence, without day, and recover their costs.

* * *

APPENDIX C

7 Fla. L. Weekly Supp. 208a

Municipal corporations – Ordinances – Adult entertainment – Plaintiffs, who performed in theatrical production which included nudity at establishment licensed to sell alcohol, are not entitled to temporary injunction prohibiting city from enforcing ordinance which generally prohibits nudity upon premises licensed to sell alcoholic beverages – Performance fell within exemption contained in county's anti-nudity ordinance because "it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain"

CHRISTY MCKEE and MARGARET K. MORGAN, Plaintiffs, vs. CITY OF CASSELBERRY, FLORIDA, Defendant.
Circuit Court, 18th Judicial Circuit in and for Seminole County.
Case No. 99-CA-1430-16-E.
December 30, 1999.
O.H. Eaton, Jr., Judge.
Counsel: H. Franklin Robbins, Jr., H. Franklin Robbins, Jr., P.A., Orlando; and Steven G. Mason, Steven G. Mason, P.A., Orlando, for Plaintiffs. Donna L. McIntosh, Stenstrom, McIntosh, Colbert, Whigham & Simmons, P.A., Sanford; and Bradly Roger Bettin, Sr. and Anthony A. Garganese, Amari & Theriac, P.A., Cocoa, for Defendant.

AMENDED

ORDER DENYING TEMPORARY INJUNCTION

The plaintiffs in this case, Christy McKee and Margaret K. Morgan, have moved for a temporary injunction prohibiting the City of Casselberry from enforcing City Ordinance 98-922 which generally prohibits nudity upon premises licensed to sell alcoholic beverages.

The complaint alleges and the evidence presented established that the Plaintiffs performed in a production entitled *Femmes Fatale* which included nudity at the Club Juana, an establishment licensed to sell alcohol. They were subsequently arrested for violation of the ordinance. The criminal charges were filed in the County Court of Seminole County.

In order to understand the issues in this litigation it is necessary to review the ordinances in question and the evidence presented at the hearing on the motion for temporary injunction.

Fair is Foul and Foul is Fair

Both Seminole County and the City of Casselberry have enacted ordinances regulating "adult entertainment" in clubs which feature nude or partially nude dancing. The Seminole County Public Decency Ordinance is an anti-nudity ordinance (with exemptions) and provides as follows:

> "*Section 5. Nudity, Sexual Conduct Prohibited.*
>
> (a) No person shall knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in section 3(d), or expose to public view his or her genitals, vulva, penis,

pubic area, or buttocks, or any simulation thereof;

(b) No person shall knowingly, intentionally, or recklessly expose, or cause a female person to expose her breasts or any simulation thereof to public view;

(c) No person or entity maintaining, owning or operation [sic] a public place shall encourage, allow or permit any person to appear nude or to expose to public view his or her genitals, pubic area, vulva, penis, anus or any portion of the buttocks or simulation thereof. This section shall be violated if any portion of the buttocks is visible from any vantage point.

* * * *

(f) Each female person may determine which 1/4 of her breast surface area (see definition of breast) contiguous to and containing the areola is to be covered;[1]

* * * *

(h) It shall be unlawful for any person to knowingly, intentionally, or recklessly appear, or cause another person to appear, nude, as defined in Section 3(d), in a public place or in any other place which is readily visible to the public, except as provided in Section 6. It shall also be unlawful for any person or entity maintaining, owning, or operating any public place to encourage, suffer or

[1] This exemption is apparently for ladies of fashion who wear low cut dresses at cocktail parties both in Seminole County and in the City of Casselberry. They should remember that the exposure limit is 25% and no more. A caliper may be necessary in close cases.

allow any person to appear nude in such public place, except as provided in Section 6.

Section 6. Exemptions. The prohibitions of Section 5 of this Ordinance shall not apply:

* * * *

(b) When the conduct of being nude can not legally be prohibited by this Ordinance because: (i) it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (citation omitted), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution."

Unlike Seminole County, the City of Casselberry does not find nudity to be offensive. It fears "disturbances associated with mixing alcohol and nudity" in public places. The City of Casselberry Ordinance provides as follows:

* * * *

"Whereas, the City Commission of the City of Casselberry, Florida, hereby finds and declares that this Ordinance is in addition and supplemental to the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code and that this Ordinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code; and

> Whereas, the City Commission of the City of Casselberry hereby finds and declares that this Ordinance shall not be construed as opting the City of Casselberry out of the Seminole County Public Decency Ordinance * * * * .
>
> * * * *
>
> It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited."

Since the City of Casselberry ordinance "is in addition to and supplemental to the Seminole County Public Decency Ordinance" and since the City of Casselberry ordinance "in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance," it is apparent that the constitutional exemption contained in the Seminole County Public Decency Ordinance was intended not to conflict with the City of Casselberry ordinance. That being the case, the ordinances, when read together, do not prohibit alcoholic beverages from being sold when nudity "constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message

or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain (citation omitted), and as such is protected by the United States Constitution or Florida Constitution, or (ii) it is otherwise protected by the United States Constitution or Florida Constitution."

The question thus presented is whether the performance of *Femes Fatale* violated the City of Casselberry ordinance or fell within the exemption stated in the Seminole County Public Decency Ordinance.[2]

Round about the caldron go;

In the poison'd entrails throw.

Doubtless seeking to come within the exemption contained within the ordinances, the Plaintiffs were recruited by the owner of the Club Juana to perform in the production of *Femmes Fatale.* Morris Sullivan, a free lance writer with an M.B.A. degree who has been in theater in Central Florida for over ten years, was hired to write the script and produce and direct the performance.

Mr. Sullivan testified that he wrote a series of vignettes, including the much publicized "Witches Scene" from Act 4, Scene 1 of Shakespeare's *McBeth,* which were designed through the use of political parody and satire to state a protest to the county and city ordinances. While nudity played a part in all of the vignettes, it was an integral part of the performance and necessary to carry the message of

---

[2] One wonders if the Casselberry Ordinance were enacted by the City of Orlando if the patrons of the Orlando Opera Company would feel protected from indecency by being denied the opportunity to sip champagne between the acts of, say, Wagner's *Das Rhinegold?*

protest. Mr. Sullivan reminded the court that nudity has been a part of theater for centuries and provided several modern examples such as *Oh Calcutta!, Angels in America* (which won a Pulitzer Prize) and *The Grapes of Wrath.*

Mr. Sullivan, Ms. McKee and Ms. Morgan testified that there were a series of rehearsals prior to the performance and the script, which is in evidence, had to be memorized.

Mr. Sullivan testified that his production of *Femes Fatale* was valid theater. This testimony was not seriously challenged by the defendant and the court accepts it as being true. He was present during the thirty five minute performance and estimated that there was nudity about 25% of the time.[3]

Double, double, toil and trouble;

Fire burn and caldron bubble.

On the night of the performance of *Femes Fatale, law* enforcement agents were present and filmed the production. The film is in evidence and the court has viewed it.[4] Broadway quality it is not. But the performance is not "adult entertainment" (nude dancing) as much as it is "entertainment for adults." While reasonable persons may disagree with the quality of the performance, it contains the elements Mr. Sullivan testified it contained – political parody and satire – elements which are in the best of American traditions. Americans have been free to jab and poke fun at their government ever since King George was ousted from our shores and they must continue to be free

---

[3] Ms. Morgan testified that the performance was more like forty five minutes – but she wasn't sure since she wasn't wearing a watch.

[4] The court will not divulge how many times.

to do so, even at the Club Juana. The performance falls within the exemption contained in the County Ordinance because "it constitutes a part of a bona fide live communication, demonstration or performance by a person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression and is not a mere guise or pretense utilized to exploit the conduct of being nude for profit or commercial gain."

Out, out, damned spot!

Since the performance of *Femes Fatale* fits within the exemption of the Seminole County Public Decency Ordinance and the Casselberry ordinance must be construed not to conflict with it, the only other issue that needs to be addressed is whether the plaintiffs are entitled to a temporary injunction. The court concludes that they are not.

The plaintiffs have their remedy in the Seminole County Court to challenge the charges pending against them and, if they lose, the right to appeal the decision. They also have a civil remedy for damages if they were wrongfully charged with a crime. Further, it is not possible for this court to prejudge the future conduct of the plaintiffs if they repeat the performance of *Femes Fatale* or any other production. Accordingly, it would be counter productive to enjoin the City of Casselberry from enforcing the ordinance against future constitutionally protected activities.

Finally, all those who will disagree with the court's findings and conclusions should recall the days of the Great Depression when the federal government hired commercial artists to provide paintings and sculptures for public buildings. These artists wrote a ditty that is sung to the

tune of "My Bonnie Lies Over the Ocean" which is fully set forth as follows:

We rise up so early each morning,

All eager to start up the day.

We get out our paints and our brushes,

And work for the WPA.

(Refrain)

All for art,

All for art.

That's why we do what we do,

We do.

All for art,

All for art,

When you work for the red, white, and blue.

We're trying to paint on the pittance

They pay in the WPA.

The fruit we'll be eatin' tomorrow,

Is the still life we're painting today.

(Refrain)

And so we exist on per diems,

Each masterpiece comes from the heart.

They may never hang in museums,

But who is to say they ain't art.

(Refrain)

IT IS ADJUDGED:

The Plaintiffs' Motion for Temporary Injunction is denied.

* * *

APPENDIX D

CHRISTY MCKEE AND PINTER ENTERPRISES, INC., Appellant, v. CITY OF CASSELBERRY, FLORIDA, Appellee

CASE NO. 5D03-1744

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

2004 Fla. App. LEXIS 7799

May 5, 2004, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Released for Publication May 24, 2004.

PRIOR HISTORY: *McKee v. City of Casselberry*, 2004 Fla. App. LEXIS 4683 (Fla. Dist. Ct. App. 5th Dist., Mar. 30, 2004)

OPINION:

REHEARING DENIED.

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

CHRISTY McKEE, and
PINTER ENTERPRISES, INC.,
d/b/a Club Juana,

Appellants,

v. CASE NO.: 5D03-1744

CITY OF CASSELBERRY, FLORIDA,

Appellee.

_____/

APPELLANTS' MOTION FOR CLARIFICATION, REHEARING AND REHEARING EN BANC

TO: HONORABLE ROBERT J. PLEUS, JR.
HONORABLE RICHARD B. ORFINGER
HONORABLE WILLIAM D. PALMER
FIFTH DISTRICT COURT OF APPEAL
300 SOUTH BEACH STREET
DAYTONA BEACH, FLORIDA 32114

The Appellants, **CHRISTY McKEE** and **PINTER ENTERPRISES, INC.,** pursuant to Rules 9.330 and 9.331, Fla.R.App.P., request that the court clarify, rehear, or grant rehearing en banc in this case. As grounds, the Appellants state as follows:

1. On March 30, 2004, the panel entered a per curium affirmance citing *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995).

2. The citation to *Cafe 207* is confusing because, from a procedural standpoint, *Cafe 207* has no application to

the trial court decision here. *Cafe 207* did not involve a trial on the merits addressing the government's rationale for passing its ordinance. Further, and perhaps of greater significance, the Eleventh Circuit recently receded from same.

> The County argues that *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995), which affirmed and adopted the reasoning of a trial court judgment validating a similar ordinance, requires us to uphold Ordinance 99-18. [citation omitted]. However, *Cafe 207* was decided before *Pap's A.M.*, where the Supreme Court clarified for the first time that nudity ordinances must leave ample capacity for erotic dancers to convey their erotic message, and *Alameda Books*, in which **Justice Kennedy's controlling opinion** emphasized that secondary effects ordinances must accomplish their goal of combating secondary effects "while leaving the quantity and accessibility of speech substantially, intact."

Peek-A-Boo Lounge v. Manatee County, 337 F.3d 1251, 1274, n. 23 (11th Cir. 2003) (emphasis added).

The Eleventh Circuit further distanced itself from *Cafe 207* – telegraphing that bathing suit ordinances are constitutionally suspect.

> The question we face is whether the county's prohibition, which presumably impacts the expressive component of erotic dancing, is no greater than essential to further the county's interest in preventing secondary effects. In *Pap's A.M.*, the court determined that this issue required the balancing of competing interests, and

> it concluded that a pasties and G-string requirement survived intermediate scrutiny because it "leaves ample capacity to convey the dancers' erotic message."
>
> * * *
>
> Nevertheless, we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a "de minimis" effect on the expressive component of erotic dancing or "leaves ample capacity to convey the dancers' erotic message" *Id.* On the contrary, because erotic dancers in Manatee County are not "free to perform wearing pasties and G-strings," *Id.*, arguably, the county's prohibition could significantly impact that message.

Peek-A-Boo Lounge at 1273-1274.

3. The panel's reliance upon *Cafe 207* is even more unbalanced considering that the appellants presented unrebutted expert testimony that "bathing suits" destroy the nature of striptease, and this testimony was accepted by the trial judge as "true."

> The plaintiffs called an anthropologist, Dr. Judith Lynn Hannah, as an expert in dance as a nonverbal communication. She traced the history of the striptease and in describing exotic dance stated, "it's adult entertainment and it's supposed to be somewhat naughty and somewhat risqué and you're supposed to see more flesh than you would see elsewhere. Transcript, page 357. Since the clothing requirements of the ordinances in question here forbid nudity completely (Dr. Hannah noted that more clothing is required than is seen at swimming pools and on the

> beaches) she testified that the nature of the striptease is destroyed. **That testimony is accepted as true.**

McKee v. Casselberry, 10 Fla.L.Weekly Supp 408a (Fla. 18th Jud. Cir. 2003).

4. The panel decision also conflicts with *City of Los Angeles v. Alameda Books*, 533 US 425 (2002) and *City of Erie v. Pap's A.M.*, 529 US 277 (2000). In *Alameda*, the Supreme Court articulated the process by which a secondary effects challenge (the so-called substantial governmental interest at stake) can be levied against an adult-use ordinance. Here, the trial judge found that as a matter of fact the city and county's evidence was not credible and instead accepted the testimony of the appellants' experts. Once the court made these findings, under *Alameda Books*, it was incumbent upon it to invalidate these ordinances. A general consideration of the court's evaluation of the evidence supports this assertion.

> It was admitted this exercise was not scientific and the court gives no credibility to it for proof that the Club Juana or any other adult club in the area produces adverse secondary effects.
>
> * * *
>
> In order to discredit the defendant's evidence, the plaintiffs called Dr. Terry Danner as a witness. He is a criminologist who chairs the Department of Criminal Justice at St. Leo University.
>
> * * *
>
> His testimony casts more doubt upon the findings contained in the City of Casselberry's ordinance and the information the city relied upon . . .

McKee, 10 Fla.L.Weekly Supp. 408a (Fla. 18th Jud. Cir. 2003).

Now consider how the trial judge viewed the testimony of the government's expert.

> It is disappointing to realize that the federal government has wasted the tax payers' money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

McKee v. Casselberry, 10 Fla.L.Weekly Supp. 408a (Fla. 18th Jud. Cir. 2003).

5. The trial judge upheld the ordinances because he found that as a matter of law, if other cities banned nudity in adult nightclubs, Casselberry and Seminole County could follow suit. Then, as an afterthought, he found that the preamble to Seminole County's ordinance was sufficient to uphold its ordinance – despite the fact that the evidence mounted by the appellants cast doubt upon the city's and county's evidence – as manifested by the court's findings of facts. Thus, the legal conclusions of the trial court and this panel are in sound conflict with established law.

> **This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.** If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes

> the municipality's factual findings, the municipality meets the standards set forth in *Renton*. (Citation omitted). If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to support the record with evidence renewing support for a theory that justifies its ordinance.

City of Los Angeles v. Alameda Books, 535 US 425, 438-439 (2002).

6. Finally, a word about the use of the "PCA" in this case. The standard for the issuance of a PCA has been stated and restated many times.

> This is not the first time it has been urged upon us that a written opinion was needed after we had affirmed the trial court, per curium, without opinion. Neither do I think this will be the last time, . . .
>
> * * *
>
> As far back as 1928, the Florida Supreme Court noted that when the points of law on which an appeal is predicated are well settled and a discussion of them would serve no useful purpose the decision below would be affirmed without opinion.

Williams v. State, 425 So.2d 1163-1164 (Fla. 5th DCA 1983) [Chief Judge Orfinger concurring].

This attorney cannot state with enough force that the issuance of a PCA in this case is inappropriate. It does not meet the standard – there is no Florida case which governs the court's decision in this case. Thus, the citation to

Cafe 207, which has been receded from by the Eleventh Circuit in *Peek-A-Boo*, does not justify a "PCA."[1] Therefore, this court should clarify and explain why it is affirming this case.

Extremely important constitutional issues were presented in these appeals, as reflected by the fact that there was a six day trial, the trial judge entered a lengthy opinion (which is clearly erroneous as a matter of law), Seminole County and the plaintiffs exceeded the page limits in their briefs and a fair amount of the court's and the parties' time was taken up in oral argument. As Judge Cowart explained, a PCA adds nothing to the discussion and in fact dilutes and perhaps renders the entire exercise meaningless.

> This is not a case which should be decided by a PCA. While that may dispose of the court's

---

[1] Judge Mills was correct when he stated that due to the hardship imposed upon litigants, he would no longer issue a PCA in cases assigned to him.

> For the information and benefit of the attorneys and their clients, I shall not render a per curium affirmed opinion hereafter.
>
> First, I shall sign all opinions in cases assigned to me for primary responsibility.
>
> Second, I shall write a short opinion in each case assigned to me and shall tersely give the reason for affirming each issue raised by the appellant or cross appellant.
>
> I hope that this action by me will answer the frequent complaints about per curium affirmed decisions. The attorneys and their clients will generally know why their cases are affirmed. The possible remedies from adverse decisions will be preserved for consideration by the Supreme Court.

Davis v. Sun Banks of Orlando, 412 So.2d 937 (Fla. 1st DCA 1982).

> problem in this particular case, the issue will not go away and, in the interest of the public, it should be **openly and courageously addressed**.

In the Interest of C.N.G., 531 So.2d 345, 347 (Fla. 5th DCA 1988) [J. Cowart dissenting].

7. Counsel would request that the entire court hear this case because it is a matter of great public importance as required by Rule 9.330.[2]

> I express a belief, based upon a reasoned and studied professional judgment, that the panel decision and this case is of exceptional importance.

Respectfully submitted this___day of April, 2004.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this___day of April, 2004 to **Erin O'Leary, Esquire**, and **Anthony Garganese, Esquire**, Brown, Salzman, Weiss & Garganese, P.A., PO Box 2873, Orlando, FL 32802-2873; with the original delivered to the Clerk of Court, **Frank Habershaw**, District Court of Appeal of the State of Florida,

---

[2] As the court is aware, a request for rehearing is a prerequisite for requesting rehearing en banc.

Fifth District, 300 South Beach Street, Daytona Beach, Florida 32114.

By /s/ _____

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APPENDIX F

ORDINANCE NO. 98-922

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF CASSELBERRY, FLORIDA, ADOPTING CITY CODE SECTION 10-8, MAKING IT UNLAWFUL WITHIN THE CITY OF CASSELBERRY FOR ANY MANAGER, OFFICER, AGENT, SERVANT, EMPLOYEE, CONTRACTOR, PERSON IN CHARGE, CUSTOMER, OR INVITEE OF ANY PREMISES OR BOTTLE CLUB LICENSED UNDER THE LAWS OF FLORIDA TO SELL OR ALLOW THE CONSUMPTION OF ALCOHOLIC BEVERAGES TO KNOWINGLY, INTENTIONALLY, OR RECKLESSLY EXHIBIT, SUFFER, ALLOW, PERMIT, ENGAGE IN, PARTICIPATE IN, OR BE CONNECTED WITH NUDITY UPON THE LICENSED PREMISES; PROVIDING DEFINITIONS FOR THE TERMS "BREAST", "BUTTOCKS", "PERSON", AND "NUDITY" OR "NUDE" WHICH SHALL HAVE THE SAME MEANINGS AS THOSE TERMS ARE ALSO DEFINED IN SECTION 3 OF THE PUBLIC DECENCY ORDINANCE OF SEMINOLE COUNTY, FLORIDA; PROVIDING LIMITED EXCEPTIONS STATED HEREIN; PROVIDING FOR ENFORCEMENT AND PENALTIES FOR VIOLATIONS OF THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCORPORATION INTO THE CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Commission of the City of Casselberry, Florida, called and scheduled a referendum

election that was held concurrent with the general election on the 3rd day of November, 1998; and

WHEREAS, the referendum election presented the following non-binding question to the electorate of the City of Casselberry, Florida:

> Shall the City of Casselberry enact legislation that prohibits a person from publicly appearing nude in any establishment that is licensed by the State of Florida to permit the sale, service, or consumption of alcoholic beverages?
>
> ___Yes
> ___No

WHEREAS, the electors of Casselberry had an opportunity to cast their vote on the aforementioned question at the ballot box and by absentee ballot; and

WHEREAS, the Seminole County Canvassing Board has certified the election results on the aforementioned question to the City of Casselberry; and

WHEREAS, City Commission of the City of Casselberry has affirmed and approved the certified results on the aforementioned question for the City of Casselberry; and

WHEREAS, the certified election results indicate that 3,202 voters (59.53%) voted "yes" to enacting legislation prohibiting a person from publicly appearing nude in any establishment that is licensed by the State of Florida to permit the sale, service, or consumption of alcoholic beverages, while 2,177 (40.47%) voted "no" to enacting such legislation; and

WHEREAS, the City Commission of the City of Casselberry, Florida, finds and declares that the certified election results of the aforementioned referendum establish a community standard within the City of Casselberry that prohibits a person from publicly appearing nude in any establishment that is licensed by the State of Florida to permit the sale, service, or consumption of alcoholic beverages on the licensed premises; and

WHEREAS, the City Commission of the City of Casselberry, Florida, desires to enact legislation that codifies this community standard into the City of Casselberry Code of Ordinances; and

WHEREAS, the City Commission of the City of Casselberry, Florida, also finds and declares that nudity, coupled with alcohol in public places, encourages undesirable behavior and is not in the best interests of the public health, safety, and welfare of the citizens of the City of Casselberry; and

WHEREAS, the City Commission of the City of Casselberry, Florida, has chosen to avoid the disturbances associated with mixing alcohol and nudity by means of a reasonable restriction upon any premises or bottle club licensed under the laws of Florida to sell or allow the consumption of alcoholic beverages on the licensed premises; and

WHEREAS, pursuant to Section 562.45, Florida Statutes (1997) and Article VIII, Section 2 of the Florida Constitution, the City of Casselberry has the power and right to enact ordinances regulating the type of entertainment and conduct permitted in any establishment licensed by the State of Florida to sell alcoholic beverages for consumption on the licensed premises or any bottle

club which is located within the City of Casselberry, *see City of Miami Springs v. J.J.T., Inc.*, 437 So. 2d 200 (Fla. 3rd DCA 1983); *Board of County Commissioners of Lee County v. Dexterhouse*, 348 So. 2d 916 (Fla. 2d DCA 1977), affirmed 364 So. 2d 449, appeal dismissed 441 U.S. 918 (1979); and

WHEREAS, on November 3, 1998, by a duly held referendum on a question which was separate and apart from the aforesaid referendum question called and scheduled by the City of Casselberry, the electors of Seminole County, Florida (residing in unincorporated and incorporated Seminole County, Florida) approved Seminole County's adoption of the "Seminole County Public Decency Ordinance"; and

WHEREAS, as of the effective date of the Seminole County Public Decency Ordinance, that Ordinance has been applicable county-wide (including within the City of Casselberry) and is generally intended to prohibit a person from intentionally or recklessly appearing or being nude or causing another person to appear or be nude in a public place and in other places which may reasonably be expected to be observed by the public within Seminole County; and

WHEREAS, the City Commission of the City of Casselberry, Florida, hereby finds and declares that this Ordinance is in addition and supplemental to the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code and that this Ordinance in no way whatsoever is intended to conflict with the Seminole County Public Decency Ordinance and the City of Casselberry Adult Entertainment Code; and

WHEREAS, the City Commission of the City of Casselberry, Florida, finds and declares that this Ordinance shall not be construed as opting the City of Casselberry out of the Seminole County Public Decency Ordinance; and

WHEREAS, this Ordinance is a general ordinance regulating conduct and is not an ordinance that affects the use of land as contemplated by Section 166.041, Florida Statutes (1997); and

WHEREAS, the City Commission of the City of Casselberry, Florida, finds that this ordinance is supported by federal and state case law, *see* e.g., *California v. La Rue*, 409 U.S. 109 (1972); *44 Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, 116 S. Ct. 1495 (1996); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985); and

WHEREAS, the City Commission of the City of Casselberry deems that this Ordinance is in the best interests of the public health, safety, welfare, and morals of the citizens of the City of Casselberry, Florida.

NOW, THEREFORE, BE IT ENACTED BY THE CITY COMMISSION OF THE CITY OF CASSELBERRY, FLORIDA, AS FOLLOWS:

Section 1. Sec. 10-8 Adopted. The City Commission of the City of Casselberry, Florida, hereby adopts a new Section 10-8 of the Casselberry Code of Ordinances, to fully read as follows:

SEC. 10-8 Nudity Prohibited Upon Alcohol Licensed Premises and Bottle Clubs.

(a) *Definitions.* When used in this section the following terms shall have the following meanings which are intended to have the same meanings as those same terms are defined in Section 3 of the Public Decency Ordinance of Seminole County, Florida, as follows:

(1) **"Breast"** shall mean a portion of the human female mammary gland (commonly referred to as the female breast) including the nipple and the areola (the darker colored area of the breast surrounding the nipple) and an outside area of such gland wherein such outside area is: (i) reasonably compact and contiguous to the areola, and (ii) contains at least the nipple and the areola and 1/4 of the outside surface area of such gland.

(2) **"Buttocks"** shall mean (For a short general description see the last sentence of this subsection) the area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary straight lines running parallel to the ground when a person is standing, the first or top of such line being 1/2 inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom of such line being 1/2 inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles

running from the back of the hip to the back of the leg) and the second or bottom of such line being 1/2 inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary straight lines, one on each side of the body (the "outside lines"), which outside lines are perpendicular to the ground and to the horizontal lines described above and which perpendicular outside lines pass through the outermost point(s) at which each nate meets the other side of each leg. Notwithstanding the above, buttocks shall not include the leg, the hamstring muscle below the gluteal fold, the tensor fasciae late muscle or any of the above-described portion of the human body that is between either: (i) the left inside perpendicular line and the left outside perpendicular line, or (ii) the right inside perpendicular line and the right outside perpendicular line. For the purpose of the previous sentence the left inside perpendicular line shall be an imaginary straight line on the left side of the anus: (i) that is perpendicular to the ground and to the horizontal lines described above, (ii) that is 1/3 of the distance from the anus to the left outside line, and the right inside perpendicular line shall be an imaginary straight line on the right side of the anus (i) that is perpendicular to the ground and to the horizontal lines described above, and (ii) that is 1/3 of the distance from the anus to the right

outside line. (The above description can generally be described as covering 1/3 of the buttocks centered over the cleavage for the length of the cleavage).

(3) **"Nudity"** or **"Nude"** shall be used interchangeably and shall mean any person insufficiently clothed in any manner so that any of the following body parts are not entirely covered with a fully opaque covering:

i. the male or female genitals, or

ii. the pubic area, or

iii. the vulva, or

iv. the penis, or

v. the female breast (each female person may determine which 1/4 of her breast surface area (see definition of breast) contiguous to and containing the nipple and the areola is to be covered), or

vi. the anus, or

vii. the anal cleft, or

viii. the anal cleavage, or

ix. the buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-strings, T-backs, dental floss and thongs.

For purposes of this subsection (3), body paint, body dyes, tattoos, liquid latex whether wet or dried, string and dental

floss and similar substances shall not be considered "opaque covering"

(4) **"Person"** shall mean any live human being aged ten (10) years of age or older.

(b) ***Prohibition.*** It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer, or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited.

(c) ***Exceptions.*** It is not a violation of this section for any person to engage in the ordinary and customary bona fide use of an enclosed single sex public restroom, enclosed single sex functional shower, or enclosed single sex locker and/or dressing room facilities. It is also not a violation of this section for a mother to breast feed her baby.

(d) ***Enforcement and Penalties.*** Any person violating any of the provisions of this section shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the State of Florida in a court having jurisdiction of misdemeanors by the prosecuting attorney

thereof and, upon conviction, shall be punished by a fine not to exceed Five Hundred and No/100 Dollars ($500.00) or by imprisonment in the County jail not to exceed sixty (60) days or by both such fine and imprisonment as provided in Section 162.22, Florida Statutes (1997). Each incident or separate occurrence of any act that violates this section shall be deemed a separate offense. In addition to the penalties provided under this section, violators of this section shall be subject to any other appropriate civil or criminal action provided by law in a court of competent jurisdiction.

Section 2. Severability. If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, whether for substantive, procedural, or any other reason, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance. To that end, the provisions of this Ordinance shall be deemed severable to the maximum extent permitted by law.

Section 3. Incorporation Into Code. This ordinance shall be incorporated into the Casselberry City Code and any section or paragraph number or letter and any heading may be changed or modified as necessary to effectuate the foregoing.

Section 4. Effective Date. This ordinance shall become effective immediately upon adoption by the City Commission of the City of Casselberry, Florida.

ADOPTED by the City Commission of the City of Casselberry, Florida, in a regular meeting assembled on the 4th day of January, 1999.

/s/ Bruce A. Pronovost
Bruce A. Pronovost,
Mayor

ATTEST:

/s/ Thelma McPherson
Thelma McPherson,
City Clerk

First Reading: December 7, 1998

Second Reading
and Public Hearing: January 4, 1999

Effective Date: January 4, 1999

(2)

Supreme Court, U.S.
FILED
SEP 28 2004
OFFICE OF THE CLERK

No. 04-177

In The Supreme Court of the United States

CHRISTY McKEE and PINTER ENTERPRISES, INC., d/b/a CLUB JUANA,

Petitioners,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Fifth District

BRIEF OF RESPONDENT IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Casselberry's Ordinance No. 98-922, which regulates nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages, is constitutional.

PARTIES TO THE PROCEEDING

The parties listed in the caption, Christy McKee, Pinter Enterprises, Inc. d/b/a Club Juana, and the City of Casselberry, Florida, are the only parties to this proceeding.

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I. Club Juana has failed to articulate any specific challenges to the decision rendered by the Florida Fifth District Court of Appeal, and therefore, has not presented any issues which this court has jurisdiction to review 10

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STATEMENT OF THE CASE

Petitioner Christy McKee (hereinafter referred to as "McKee") and former Plaintiff Margaret K. Morgan (hereinafter referred to as "Morgan" filed suit against Respondent, City of Casselberry, Florida, (hereinafter referred to as "City" or "Casselberry") for a judgment declaring that Casselberry Ordinance Number 98-922 (hereinafter referred to as "Ordinance No. 98-922" or "Casselberry Alcohol-Public Nudity Ordinance") is invalid under the Florida and/or United States Constitutions, and for an injunction permanently forbidding the enforcement of Ordinance No. 98-922. McKee and Morgan also sought the issuance of a temporary injunction to prevent the enforcement of Ordinance No. 98-922 during the pendency of the litigation. Following a hearing, McKee and Morgan's motion for temporary injunction was denied.

McKee and Morgan subsequently amended their complaint to add Michael E. Pinter as a Plaintiff, and thereafter amended their complaint once again to substitute Pinter Enterprises, Inc. d/b/a Club Juana (hereinafter referred to as "Club Juana") for Michael Pinter as one of the plaintiffs in the case. Pinter Enterprises, of which Michael Pinter is the President, owns the license which authorizes liquor to be dispensed at Club Juana.

Casselberry moved for the entry of final summary judgment or alternatively, partial summary judgment. McKee, Morgan, and Club Juana responded by filing a cross motion for summary judgment. The court entered partial summary judgment, stating "The similarities between the Casselberry Ordinance [and] the ordinance in [*City of*] *Erie* [*v. Pap's A.M.*, 529 U.S. 277 (2000)] leads to the conclusion that the Casselberry Alcohol-Public Nudity

Ordinance is content-neutral and entitled to only the 'outer ambit' of First Amendment protection." The court also ruled that the Casselberry Alcohol-Public Nudity Ordinance passes the first prong of the legal test for determining the constitutionality of statutory regulation of expressive conduct set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), because the enactment of the ordinance is within the constitutional power of the City since the City's efforts in enacting the Ordinance are to protect the public health, safety, and welfare.

Casselberry thereafter moved for summary judgment regarding the proper evidentiary standard required at trial. The court ruled upon said motion by ordering that the following issues were set for trial:

> 1. What information, if any, did the City of Casselberry rely upon in making its legislative findings concerning the "secondary effects" recited in the ordinance?
>
> 2. If the City of Casselberry relied upon information in making its legislative findings, was the reliance reasonable?
>
> 3. Does the ordinance provide for "an adequate alternative means of communication?"

Morgan thereafter voluntarily dismissed her case without prejudice, leaving McKee and Club Juana as the plaintiffs. Following a lengthy trial, the trial court entered final judgment in favor of Casselberry. McKee and Club Juana appealed to the Fifth District Court of Appeal of the State of Florida. The Florida Fifth District Court affirmed. *McKee v. City of Casselberry,* 873 So. 2d 373 (Fla. 5th DCA

2004). McKee and Club Juana moved for rehearing, but their motion was denied. (Pet. App. 28)[1] McKee and Club Juana did not seek discretionary review in the Florida Supreme Court and opted, instead, to seek review in this Court.[2]

STATEMENT OF THE FACTS

A. Ordinance No. 98-922

Despite Club Juana's suggestions to the contrary, Ordinance No. 98-922 is not a public nudity ordinance; rather, it is an ordinance which regulates nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages. (Pet. App. 46) Simply stated, Ordinance No. 98-922 prohibits the combination of alcohol and nudity in said licensed establishments.

Ordinance No. 98-922 provides in relevant part:

> ***Prohibition.*** It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer, or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity

[1] The Appendix to the Petition for Writ of Certiorari will be referred to herein as "Pet. App." followed by the corresponding page number.

[2] McKee and Club Juana will hereafter be referred to collectively as "Club Juana."

> upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited.

(Pet. App. 46)

The preamble to Ordinance No. 98-922 states that the City Commission "finds and declares that nudity, coupled with alcohol in public places, encourages undesirable behavior and is not in the best interests of the public health, safety, and welfare of the citizens of the City of Casselberry" and further states that the City of Casselberry "has chosen to avoid the disturbances associated with mixing alcohol and nudity by means of a reasonable restriction upon any premises or bottle club licensed under the laws of Florida to sell or allow the consumption of alcoholic beverages on the licensed premises." (Pet. App. 40) The preamble to Ordinance No. 98-922 also states that it is supported by federal and state case law, and specifically lists examples of that case law. (Pet. App. 42)

B. Misstatements of Fact Contained Within Club Juana's Petition for Writ of Certiorari

In its Petition, Club Juana asserts that the trial court found that "the [C]ity failed to present credible evidence supporting its ordinance," that the court discounted the City's secondary effects evidence, that the trial judge "emphatically rejected" the testimony of the City's expert witness, William Henry George, Ph.D, and that the trial court "rejected" the City's evidence in this case. (Pet. for Writ of Cert., pp. 4, 5, 6) Those assertions are simply false.

In its order, the trial court stated:

> The city presented numerous documents as exhibits to prove adverse secondary effects occur as a result of serving nudity with alcohol. These documents include records of service calls made by the police to various locations, crime rate statistics and other information. **Taken together, the testimony presented and the evidentiary exhibits submitted suggest, but do not prove, that adult clubs cause adverse secondary effects.**

(Pet. App. 10) (emphasis added) The trial court did not say, or even suggest, in this provision or any other part of its order that the City's evidence was not credible, that the City's evidence was discounted, or that the City's evidence was rejected.

Additionally, although the trial court apparently believed the studies conducted by Dr. George on the effects of sexual arousal and sexual risk-taking, some of which have been funded by a $1.8 million grant from the federal government, did not reveal anything that is not already generally known, nowhere within the trial court's order did the trial court state that Dr. George's testimony was rejected. (Pet. App. 11-13) If anything, the trial court's commentary suggested that the trial court is of the opinion that Dr. George's studies were unnecessary because the conclusions he reached are already matters of common knowledge.

Furthermore, the trial court stated that the testimony of Casselberry City Manager Jack Schluckebier "saved the day for Casselberry," and that it "is convincing and it is accepted." (Pet. App. 14, 16) The trial court even quoted in its order several paragraphs from the transcript of

Schluckebier's testimony. (Pet. App. 14-16) The trial court's order indicates that Schluckebier's testimony was not "rejected" in any way whatsoever.

In short, nowhere within its order did the trial court indicate that "the [C]ity failed to present credible evidence supporting its ordinance," that it discounted the City's secondary effects evidence, that the testimony of Dr. George was rejected, or that any of the City's evidence was rejected. Accordingly, Club Juana's assertions that such findings and conclusions were made by the trial court are misstatements of the facts of this case.

Club Juana also contends that the City relied upon evidence that adult entertainment clubs cause a decrease in property values as evidence of adverse secondary effects in adopting Ordinance No. 98-922. That statement is also false. Although there was some discussion regarding this issue during atleast one of the City Commission meetings held prior to the adoption of Ordinance No. 98-922, no evidence was presented to the City Commission regarding a decrease in property values as a secondary effect of adult entertainment clubs that was relied upon by the City Commission as a basis for adopting Ordinance No. 98-922.

C. Evidence Presented By the City In Support of Ordinance No. 98-922

In its Petition, Club Juana states that the City's evidence in support of Ordinance No. 98-922 is "scanty," and that it's "pre-enactment 'evidence' comes down to handful of charts." (Pet. for Writ of Cert. 15) That assertion is far from the truth, to say the least.

The record in this matter establishes that the City relied upon a multitude of evidence before adopting Ordinance No. 98-922. Specifically, the City engaged in an eight to ten month process of workshops and hearings before adopting Ordinance No. 98-922. The evidence presented to and considered by the City Commission during that extensive process included, but was not limited to the following: information regarding arrests and illegal activity including drug trafficking, drug consumption, prostitution, illicit sex, robberies, and arrests at Club Juana and Rachel's (which is another adult entertainment club located in Casselberry); affidavits from former employees of Rachel's who were arrested during an undercover sting operation, indicating illicit activity such as prostitution and drug sales occurs at the clubs; the report of Casselberry Police Department Lieutenant Joe Mulson regarding the arrests of seventeen persons at Rachel's as a result of the undercover sting operation; testimony of other individuals regarding the adverse secondary effects created by the mix of alcohol and nudity; case law and studies from foreign jurisdictions regarding the secondary effects of the combination of alcohol and nudity; the results of the non-binding referendum held in Casselberry, in which the citizens of Casselberry indicated they approved of the City Commission enacting Ordinance No. 98-922; and a series of charts and testimony which depicted the community standards of Seminole County and cities surrounding Casselberry, and the fact that Casselberry's standards were lower than the standards of all surrounding communities.

At trial, the City presented ample evidence supporting its adoption of Ordinance No. 98-922. Specifically, City Manager Schluckebier testified regarding the history of

the City's regulations on adult entertainment; the City's purpose and intent in adopting regulations on adult entertainment; the City's desire to combat the adverse secondary effects occurring in the City as a result of the adult entertainment establishments located within the City; and the extensive evidence (which is outlined above) that was presented to the City Commission over several months before the adoption of Ordinance No. 98-922.

Dr. William Henry George also testified on behalf of the City at trial. Dr. George is a clinical psychologist and associate professor in the psychology department at the University of Washington. He also is Principle Investigator for Research on Alcohol's Effects on Sexual Arousal. He has conducted research experiments on alcohol and sexual arousal for over 20 years, and has been granted a $1.8 million federal grant to study over a five year period the effects of drinking on sexual arousal and sexual risk taking. Through his research, Dr. George has demonstrated that alcohol in combination with eroticized nudity does indeed cause adverse secondary effects.

Furthermore, at trial the City presented a plethora of evidence, including hours of undercover video tapes, documenting the illegal activity which in fact occurred at Rachel's. Indeed, Club Juana did not even attempt to refute the evidence of known illegal activity that occurred at Rachel's.

In short, Club Juana's claim that the City's evidence in support of Ordinance No. 98-922 was "scanty" is belied by the record in this matter.

D. Important Evidence Presented By Club Juana That Club Juana Failed to Mention in Its Petition for Writ of Certiorari

In its Petition for Writ of Certiorari, Club Juana places heavy emphasis on the testimony of Judith Hanna and the fact that the trial court accepted her testimony as true. It must be noted that within all of Hanna's testimony, she stated that a dancer's message can still be communicated and the dance still has serious artistic value in the absence of alcohol. She also testified that the receiver of the dance message does not have to consume alcohol in order to receive the message; "alcohol is irrelevant to [the] message. It's not part of the dance." Further, Hanna testified that you do not have to be in a bar to convey the message of erotic dancing.

Additionally, Club Juana failed to mention the testimony of Michael Pinter and Petitioner McKee. Pinter testified that ninety-five to ninety-nine percent of Club Juana's business is attributed to alcohol sales. He stated that Club Juana dancers who are over twenty-one years of age can drink alcohol and socialize with the patrons, so that there is a party atmosphere. Pinter also testified that there have been occasions when Club Juana dancers and waitresses had to be sent home because they were intoxicated.

Petitioner McKee testified that Club Juana dancers are permitted to drink alcohol at Club Juana while working. She stated that it is not necessary to drink alcohol in order to convey an erotic message. McKee also testified that she played a part in *Femmes Fatale*, and that it is not necessary for the audience who sees *Femmes Fatale* to drink alcohol in order to understand *Femmes Fatale*.

Furthermore, Club Juana failed to mention that its expert, Terry Danner, testified that of the studies he has

done, none of them were designed with the purpose or target of determining whether the combination of alcohol and nudity causes undesirable effects. Furthermore, his studies, which purportedly showed an increase in crime after the adoption of Ordinance No. 98-922, focused on index crimes, such as rape. Index crimes are not the types of crimes that Ordinance No. 98-922 was intended to reduce.

Club Juana also did not mention that Danner testified that the consumption of alcohol can cause people to become disinhibited, thereby increasing their potential to commit crime, and that establishments that allow an "anything goes" party atmosphere can be conducive to crime. In addition, Danner stated that places that serve alcohol as an important part of their business can facilitate crime. Further, Danner testified that a sexually-charged and alcohol prevalent environment can increase sexual assaults.

Danner stated that: an establishment offering live, nude dancing generally creates a sexually-charged atmosphere; an establishment that encourages a party atmosphere may also encourage sexual aggression; and, a party atmosphere can facilitate the occurrence of illegal drug use and sales.

ARGUMENTS FOR DENYING THE PETITION

I. Club Juana has failed to articulate any specific challenges to the decision rendered by the Florida Fifth District Court of Appeal, and therefore, has not presented any issues which this court has jurisdiction to review.

Club Juana seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257, which vests this Court with certiorari jurisdiction to review certain "[f]inal judgments

or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The District Court of Appeal for the Fifth District of Florida is an intermediate appellate court, but is considered to be the "highest court" of Florida for the jurisdictional purposes of 28 U.S.C. § 1257(a). Accordingly, the "final judgment or decree" that is before this Court for review is the opinion on this matter that was rendered by the Florida Fifth District Court of Appeal, which is reported at *McKee v. City of Casselberry,* 873 So. 2d 373 (Fla. 5th DCA 2004).

In its Petition for Writ of Certiorari, Club Juana suggests that it is seeking review of the Fifth District Court's decision in this matter. A cursory review of Club Juana's argument, however, reveals that Club Juana has not set forth one single challenge to the Fifth District Court's decision in this case. Instead, Club Juana is asking this Court to review the bases for the trial court's ruling upholding Casselberry's Alcohol-Public Nudity Ordinance. Indeed, Club Juana summarized Point One of its case as follows:

> Rather than rehashing the evidence presented below, this case can be summed up by the fact that the trial court rejected Casselberry's evidence. Instead, the court upheld the ordinance on a misplaced legal theory – that Casselberry could prohibit nude dancing because other municipalities had ordinances prohibiting same. This justification completely undermines and ignores *Alameda Books* and *Pap's*.
>
> Because of this distortion, and because this case gives the Court a clear opportunity to highlight the import of the *Alameda Books'* standard (based upon a trial on the merits), this Court should accept review over this case.

(Pet. for Writ of Cert., pp. 15-16) Likewise, with regard to Point Two, Club Juana summarized its argument as follows: "The trial judge got the facts right but got the law wrong. For whatever reason he misunderstood the nature of the fourth prong of *O'Brien*."

It is important to note that the Fifth District Court conducted de novo review of the trial court's decision upholding Ordinance No. 98-922. *See North Florida Women's Health and Counseling Serv., Inc. v. Florida*, 866 So. 2d 612 (Fla. 2003) (trial court's ruling concerning the constitutionality of a statute or ordinance is subject to de novo review). Since the Fifth District Court did not issue a written opinion, but rather merely issued a citation decision, there is no way to determine the basis for the Fifth District Court's decision. (*See* Pet. App. A; *McKee v. Casselberry*, 873 So. 2d 373 (Fla. 5th DCA 2004)) For all we know, the Fifth District Court completely rejected the trial court's conclusions and decided to uphold the constitutionality of Ordinance No. 98-922 for entirely different reasons.

In any event, the Petition for Writ of Certiorari should be denied because Club Juana failed to articulate therein why this Court should exercise its discretionary jurisdiction to review the Fifth District Court's decision.

II. Ordinances similar to Ordinance No. 98-922 have repeatedly been declared constitutional by this Honorable Court and state and federal courts around the country, and therefore, this case does not present an important question that has not been, but should be, settled by this Court.

As indicated above, the question presented in this case is whether Casselberry's Ordinance No. 98-922, which

regulates nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages, is constitutional. Ordinances similar to the one at issue herein have been declared constitutional by this Court and federal and state courts around the country. *See, e.g., City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002); *Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Ga.*, 217 F.3d 1360 (11th Cir. 2000); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000); *Geaneas v. Willets*, 911 F.2d 579 (11th Cir. 1990), *cert. denied*, 499 U.S. 955 (1991); *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir. 1988); *Fillingim v. Boone*, 835 F.2d 1389 (11th Cir. 1988); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982); *City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985); *Carchio v. City of Ft. Lauderdale*, 755 So. 2d 668 (Fla. 4th DCA 1999), *rev. denied*, 753 So. 2d 563 (Fla. 2000); *City of Bangor v. Diva's, Inc.*, 830 A.2d 898 (Me. 2003); *Township of Van Buren v. Garter Belt, Inc.*, 673 N.W.2d 111 (Mich. Ct. App. 2003), *appeal denied*, 682 N.W.2d 86 (Mich. 2004); *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228 (R.I. 2000).

As the case law cited above reveals, the issue presented by this case is well-settled. Municipalities may indeed constitutionally regulate nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages. Since there is no unsettled, important

question presented by this case, this Court should deny Club Juana's Petition for Writ of Certiorari.

III. The Florida Fifth District Court of Appeal did not issue a published opinion in this case, and therefore, its decision does not create a conflict with any decision of a state court of last resort or federal court. Accordingly, this case does not merit this Court's review.

The Florida Fifth District Court's decision upholding the constitutionality of Ordinance No. 98-922 is simply a citation decision; in other words, the decision merely cites one case as the basis for the court's ruling and does not discuss whatsoever the rationale for the court's ruling. (Pet. App. 1; *McKee v. City of Casselberry,* 873 So. 2d 373 (Fla. 5th DCA 2004)) Since there is no discussion contained within the court's decision, the decision does not on its face create a conflict with any other court decision.

Furthermore, as set forth above, many courts around the country have upheld the constitutionality of ordinances similar to Ordinance No. 98-922. The Fifth District Court's decision in this matter does not conflict with those decisions, but rather lends further support for the premise that municipalities may lawfully regulate nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages. Accordingly, this case does not present a conflict in the law which requires this Court's resolution, and thus, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the City of Casselberry respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

CHRISTY McKEE, and
PINTER ENTERPRISES, INC., d/b/a Club Juana,

Petitioners,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari
To The Florida Fifth District Court Of Appeal

PETITIONERS' REPLY TO RESPONSE IN OPPOSITION TO A WRIT OF CERTIORARI

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THE PRE-ENACTMENT EVIDENCE WAS INDEED SCANTY

The city challenges the statements by Ms. McKee and Club Juana that Casselberry's pre-enactment evidence was scanty, and, in so doing, it states that the city relied upon "[s]tudies from foreign jurisdictions regarding the secondary effects of the combination of alcohol and nudity; . . . " This assertion is contradicted by the record and the concessions of Ms. Babb, Casselberry's lawyer at trial.

> Ms. Babb: Your honor, objection. What governmental entities have done historically has no relevance to this case.
>
> * * *
>
> Ms. Babb: I thought we already established that its **not part of the city ordinance** that they relied on **foreign studies**, so I don't understand the relevance of what historically other cities have done.
>
> * * *
>
> Ms. Babb: Your honor, this is the exact same issue we dealt with with the previous witness. We don't – that's not in the ordinance. **It wasn't a rationale in adopting the ordinance.**
>
> Mr. Mason: So they're stipulating or not anything in this record regarding foreign studies for this court and some appellate court down the road they

> didn't rely upon any foreign studies of any kind?

(MR13/505-506).[1]

Granted, the city held several commission meetings, however, once the reader analyzes same, the "evidence" relied upon boils down to just a handful of documents and charts. This point was discussed during cross examination of the city's own expert, Dr. William George.

Dr. George conducted no studies for this particular case, instead he reviewed the charts and graphs Casselberry relied upon in passing its ordinance (R14/685-686). He was asked to review the Casselberry legislative record in support of its ordinance – all **eight pages** (R14/785-786; R9/1679-1685).

> Mr. Mason: Now, let's talk about the legislative record. How many pages in here, count it for me, that they gave you?
>
> Dr. George: 1, 2, 3, 4, 5, 6, 7, 8 pages.
>
> Mr. Mason: All right. Eight pages?
>
> Dr. George: Oh, wait. Hold on. But that also includes the ordinance itself, and then these descriptions of the ordinance are all the other pages. So it's what you said, 8 to 10 pages.

(R14/786).

Dr. George continued by describing these charts and graphs. Some of the charts simply reflect a comparison of

---

[1] All emphasis in this paper has been added unless otherwise noted.

nudity regulations of adjoining Seminole County communities – which was the basis for the court's order upholding the ordinance.

Another document, generally referred to as the "Molson" document, was prepared by a police officer who made telephone calls to other local cities to determine crime statistics for various offenses. Yet, Molson wrote down the wrong numbers when he prepared his memorandum. He reported that there were twenty sexual batteries in the Seminole County city of Altamonte Springs, a city which has no adult venues, and eleven such reports in Casselberry (R9/1685). The correct numbers were actually twenty in Altamonte Springs and seven in Casselberry (R15/804-805).

When this fact was brought to the attention of Dr. George, he agreed that the entire document must be viewed as flawed, and that the city's evidence was unreliable.

> Dr. George: No. My point is that the information you're giving me if I look at this as a scientist the information you're giving me says, oh, these **data may be flawed**. They may be less than completely accurate, and I refer to that as unreliability.
>
> Now, the thing about unreliability as soon as you know that there's unreliability then you can generalize from that, and so if these are unreliable then I can generalize that some of the others are unreliable. Therefore, I can't reach any conclusions. It would be biased to know

> that some of these data are unreliable and apply the unreliability only to these (sic) data of Casselberry 1996 and deliberately not allow that same unreliability estimate to these data up here in Altamonte Springs in 1996, and just scientifically that's what you would do.
>
> You would take the information. Oh, this is wrong. It's not 11. It's a 7. All right. **Then that tells me that all these other numbers are probably a little wobbly too**, and so I then have to generate some recipe to determine the degree of wobbliness in these numbers and that's called an error variance estimate.
>
> **And so, yeah, if you tell me that there's unreliability, I'm going to presume there's unreliability in the others as well.**

(R15/805-806).

Contrary to the city's assertion, Judge Eaton did in fact reject the testimony of Dr. George. He referred to the research as "ridiculous," and compared Dr. George to the Emperor with No Clothes.[2]

> It is disappointing to realize that the federal government has wasted the tax payers' money on this ridiculous research. If Dr. George truly takes himself seriously, then perhaps he should, like

[2] In fact, toward the end of Dr. George's testimony the trial judge himself began challenging and questioning Dr. George.

> the Emperor in the tale by Hans Christian Anderson, check to see if his science is clothing or in his imagination.

McKee v. Casselberry, 10 Fla.L.Weekly Supp. 408a at n. 2 (Fla. 18th Jud. Cir. 2003).

A simple read of Judge Eaton's order demonstrates that he rejected the city's evidence and instead opted to uphold its ordinance under a political theory that Casselberry was constitutionally entitled to conform its nudity laws to those of the surrounding communities. However, not one word is devoted to addressing this issue in Casselberry's response.

If this attorney were wrong regarding the import of the record below, Casselberry would have provided the Court with record excerpts to correct same. It did not.

Further, the city conceded property values as an element of adverse secondary effects only when it became apparent that Club Juana was armed with voluminous documents and studies demonstrating the fallacy of this argument. This is another important concession because, as testified to by Club Juana's expert Dr. Danner, the concept of urban blight and deterioration goes hand-in-hand with crime.

ARE BATHING SUITS CONSTITUTIONALLY PERMISSIBLE UNDER *ALAMEDA, PAP'S* AND *O'BRIEN*?

A central point in this petition is whether the bathing suit requirement imposed on exotic dancers violates the fourth prong of *United States v. O'Brien,* 391 U.S. 367 (1968) as discussed by Justice O'Connor in *City of Erie v.*

Pap's A.M., 529 U.S. 277 (2000) and by the Eleventh Circuit in *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003). Even before this Court, the city does not attempt to justify this highly restrictive bathing suit ordinance. Rather, its response is silent on the subject.

This court has never upheld a bathing suit requirement. The Eleventh Circuit all but invalidated one in *Peek-A-Boo*, and the Seventh Circuit recently invalidated an ordinance which also addressed heightened clothing attire. See *R.A.V. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004). Here, the trial judge accepted Dr. Hanna's statement that this amount of clothing destroys the er tic message conveyed in a striptease act. This point was accepted by the trial court and affirmed by the state Court of Appeal. Considering this, how could the ordinance be upheld?

THE CITY FAILS TO ADDRESS THE TRIAL JUDGE'S POLITICAL REASONING IN UPHOLDING THE ORDINANCE; CONTRARY TO THE SECONDARY EFFECTS MANDATE OF *ALAMEDA BOOKS*

Neither the trial judge nor the appellate court upheld this ordinance based upon the secondary effects doctrine/standard employed in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). Rather, this ordinance was upheld based upon pure political reasoning, specifically, that Casselberry was constitutionally permitted to conform its ordinance to other local cities in the region as a matter of **political equity**. Besides the fact that these other locales have no adult entertainment venues and their ordinances have never been subject to challenge, this is simply an absurd result under *Alameda Books*. If that

was the standard, *Alameda Books* would be a legal fiction and a superfluous act on the part of this Court. Despite the fact that the trial court's order departs from this Court's precedent, the city ignores this issue in its response. The city should be required to address the issues on the merits.

THE FIFTH DISTRICT AFFIRMED THE TRIAL JUDGE'S ORDER. THAT DECISION IS WITHIN THIS COURT'S JURISDICTION

The city is well aware that Ms. McKee and Club Juana could not seek review with the Florida Supreme Court based upon a per curium affirmance issued by the state District Court of Appeal. In 1980 the Florida Constitution was amended abolishing "certiorari review" at the Florida Supreme Court and replacing it with a more narrow form of review called "discretionary review." See generally *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). As such, the Club Juana PCA was not reviewable by the Florida Supreme Court and the Fifth District Court's decision is a final reviewable decision in this case.

The city now incorrectly argues that this court is likewise foreclosed from reviewing a PCA from a state District Court. The Supreme Court of the United States is a court of certiorari review not a more narrow form of review as described in the Florida Constitution. Furthermore, this Court recently granted a petition for writ of certiorari from the same Florida Court of Appeal from the issuance of a PCA. See *Corona v. Florida,* 124 S.Ct. 1658 (2004).

ALCOHOL/NUDITY ORDINANCES ARE REVIEWED UNDER THE SAME SECONDARY EFFECTS STANDARD AS ANY OTHER PUBLIC NUDITY ORDINANCE

The city continues to argue that ordinances which prohibit public nudity at establishments which are licensed to sell alcohol are permissible under the Twenty-First Amendment theory originally upheld in *California v. LaRue*, 409 U.S. 109 (1972). As stated in Club Juana's petition, that theory has been overruled and replaced with the secondary effects justification set forth in *Alameda Books*.

> However, contrary to the commission's apparent belief, the fact that the challenged restrictions regulate liquor licenses does not affect the level of scrutiny. **To be sure, the Supreme Court originally did embrace** the view that the Twenty-First Amendment creates an "added presumption in favor of the validity" of state liquor regulations (citations and internal quotes omitted). However, **the court has since specifically disavowed this approach**.

Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 513, n. 2 (4th Cir. 2002).

* * *

> In *44 Liquormart*, the court clarified both the proper analysis and the appropriate scope of liquor regulations intended to protect public decency (citation omitted). The court explained that such liquor regulations **must be analyzed in the same manner as any other public decency regulation** – the Twenty-First Amendment gives the

> states no additional authority to restrict First Amendment rights.

Giovani at 519.

In other words, from a constitutional perspective, Casselberry's ordinance is treated no differently than Seminole County's public nudity ordinance.[3] Either there was credible evidence of adverse secondary effects accepted by the fact finder or there was not.

CONCLUSION

Courts and litigants across this country need guidance and instruction from this Court on the full import of the *Alameda Books'* standard. See generally, *J.L. Spoons, Inc. v. Morckel,* 314 F.Supp.2d 746, 756 (ND OH 2004) ["clearer guidance in this area would greatly aid the court . . ."]. That is one of the reasons it is so important for this Court to accept and review this case.

Respectfully submitted this 5 day of October, 2004.

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[3] Additionally, contrary to the city's statements this Court has stated that a constitutional right cannot be denied simply because it can be exercised somewhere else. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981).